

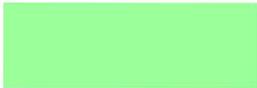


**U.S. Citizenship
and Immigration
Services**

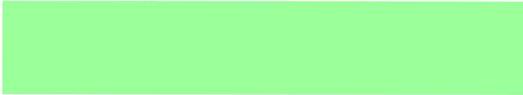
(b)(6)



DATE: **JAN 14 2013** OFFICE: TEXAS SERVICE CENTER



IN RE: Petitioner:
Beneficiary:



PETITION: Immigrant Petition for Alien Worker as a Multinational Executive or Manager Pursuant to Section 203(b)(1)(C) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(1)(C)

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of \$630. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Texas Service Center. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner claims to be an Alabama corporation that seeks to employ the beneficiary in the United States as vice president of its organization. Accordingly, the petitioner endeavors to classify the beneficiary as an employment-based immigrant pursuant to section 203(b)(1)(C) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(1)(C), as a multinational executive or manager.

In support of the Form I-140 the petitioner submitted a statement dated November 1, 2010, which contained a brief discussion of the beneficiary's employment abroad. Although the petitioner discussed the beneficiary's proffered wage in the United States as well as the U.S. company's net and gross income, no information was provided regarding the beneficiary's proposed employment. The petitioner also provided supporting documentary evidence in the form of quarterly wage and tax documents for the quarters leading up to the time the Form I-140 was filed.

The director reviewed the petitioner's submissions and determined that the petition did not warrant approval. The director therefore issued a request for evidence (RFE) dated July 6, 2010 informing the petitioner of various evidentiary deficiencies. The beneficiary's proposed employment with the U.S. entity was among the issues addressed in the RFE. Specifically, the director instructed the petitioner to provide a detailed job description of the beneficiary's proposed employment, complete with a list of the beneficiary's proposed job duties and the percentage of time the beneficiary would allocate to each task as well as the number of subordinates the beneficiary would oversee and their respective job titles, job duties, and educational levels. The director also asked the petitioner to describe the organization's management and personnel structures.

Although the petitioner responded to the RFE, the response contained a list of the same generalized statements that the petitioner had previously submitted in support of a previously filed Form I-140 (with receipt number [REDACTED]), which was also denied. Additionally, in the July 31, 2011 statement from [REDACTED] owner of the foreign entity, [REDACTED] stated that the beneficiary's proffered wage would be \$48,000 annually, an amount that is inconsistent from the \$42,000 that was initially indicated in the petitioner's Form I-140.

After considering the petitioner's response, the director determined that the petitioner failed to establish that the beneficiary would be employed with the U.S. entity in a qualifying managerial or executive capacity. The director repeated the job description that was offered in response to the RFE and acknowledged the petitioner's submission of an organizational chart. However, the director observed that the petitioner failed to provide job descriptions pertaining to the beneficiary's subordinates and further found that the description of the proposed employment was overly broad and that it failed to convey a meaningful understanding of the specific job duties the beneficiary would perform. In light of these adverse findings, the director issued a decision dated August 30, 2011 denying the petition.

On appeal, counsel disputes the decision, contending that the petitioner's supporting evidence was "either overlooked or misunderstood" and further states that job descriptions of the beneficiary's subordinates are irrelevant in this matter. Counsel asserts that the beneficiary allocates 100% of his time to the performance of tasks in an executive capacity. The petitioner also provides certain corporate, tax, and wage documents, all of which had been previously submitted.

The AAO has reviewed the record in its entirety and finds that counsel's statements are unpersuasive and fail to overcome the director's adverse decision. The discussion below will address the relevant submissions.

Section 203(b) of the Act states in pertinent part:

(1) Priority Workers. -- Visas shall first be made available . . . to qualified immigrants who are aliens described in any of the following subparagraphs (A) through (C):

* * *

(C) Certain Multinational Executives and Managers. -- An alien is described in this subparagraph if the alien, in the 3 years preceding the time of the alien's application for classification and admission into the United States under this subparagraph, has been employed for at least 1 year by a firm or corporation or other legal entity or an affiliate or subsidiary thereof and who seeks to enter the United States in order to continue to render services to the same employer or to a subsidiary or affiliate thereof in a capacity that is managerial or executive.

The language of the statute is specific in limiting this provision to only those executives and managers who have previously worked for a firm, corporation or other legal entity, or an affiliate or subsidiary of that entity, and who are coming to the United States to work for the same entity, or its affiliate or subsidiary.

A United States employer may file a petition on Form I-140 for classification of an alien under section 203(b)(1)(C) of the Act as a multinational executive or manager. No labor certification is required for this classification. The prospective employer in the United States must furnish a job offer in the form of a statement which indicates that the alien is to be employed in the United States in a managerial or executive capacity. Such a statement must clearly describe the duties to be performed by the alien.

Section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A), provides:

The term "managerial capacity" means an assignment within an organization in which the employee primarily--

- (i) manages the organization, or a department, subdivision, function, or component of the organization;
- (ii) supervises and controls the work of other supervisory, professional, or managerial employees, or manages an essential function within the organization, or a department or subdivision of the organization;
- (iii) if another employee or other employees are directly supervised, has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization), or if no other employee is directly supervised, functions at a senior level within the organizational hierarchy or with respect to the function managed; and

(b)(6)

- (iv) exercises discretion over the day-to-day operations of the activity or function for which the employee has authority. A first-line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional.

Section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B), provides:

The term "executive capacity" means an assignment within an organization in which the employee primarily--

- (i) directs the management of the organization or a major component or function of the organization;
- (ii) establishes the goals and policies of the organization, component, or function;
- (iii) exercises wide latitude in discretionary decision-making; and
- (iv) receives only general supervision or direction from higher level executives, the board of directors, or stockholders of the organization.

When examining the executive or managerial capacity of the beneficiary, the AAO will look first to the petitioner's description of the job duties. *See* 8 C.F.R. § 204.5(j)(5). The AAO also finds that is appropriate to consider this information in light of the petitioner's organizational hierarchy, the beneficiary's position therein, and the petitioner's overall ability to relieve the beneficiary from having to primarily perform the daily operational tasks.

Looking first to the job description, the AAO concurs with the director in finding that the petitioner's RFE response was inadequate and lacked a thorough description of the specific job duties the beneficiary would perform on a daily basis. A detailed job description is essential for the purpose of determining eligibility, as the actual duties themselves reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990); *see also* 8 C.F.R. § 204.5(j)(5).

According to the petitioner's 2010 corporate tax return, the petitioner operates a convenience store. Thus, the AAO must consider the beneficiary's job description within the context of a convenience store retail business. Having done so, the AAO finds that it is unable to determine precisely what actual job duties the beneficiary would perform on a daily basis and whether the predominant portion of his time would be allocated to the performance of qualifying tasks in a managerial or executive capacity. For instance, the petitioner indicated that the beneficiary would direct and coordinate the company's budget and finances. It is unclear what actual tasks fall under this general heading, particularly given that no job descriptions were provided for any of the petitioner's employees other than the beneficiary himself. Without this relevant information, the AAO cannot determine who actually performs the daily operational tasks that deal with the petitioner's budget and finances.

The petitioner also indicated that the beneficiary would confer with "company officials" and staff members to resolve problems. However, no clarifying information was provided to explain which employees are deemed

“company officials,” what types of problems the beneficiary would be involved in resolving, or what would be the beneficiary’s specific role in resolving those problems. Similarly, the petitioner has not clarified the specific tasks that signify analyzing the petitioner’s operations. The petitioner did not provide any specific parameters that would serve as the basis for the beneficiary’s analysis. Additionally, while the petitioner indicated that the beneficiary would appoint department heads and managers, the organizational chart submitted in response to the RFE indicates that the retail operation had two assistant managers. It is therefore unclear how selecting managers or department heads within the scope of a convenience store operation could be one of the beneficiary’s daily tasks.

After reviewing the sixteen IRS Form W-2s that the petitioner provided to show the salaries and wages paid to employees in 2010, the information shows that only two employees—the beneficiary and the president of the U.S. entity—received wages that were commensurate with full-time employment. The record contains no evidence of the quarterly earnings of individual employees whom the petitioner employed during the time period the Form I-140 was filed. While the AAO acknowledges that this information was not specifically requested, the record contains no evidence that would allow the AAO to gauge exactly whom the petitioner employed at the time of filing, which position the individual(s) occupied, or the extent to which the petitioner’s staff at the time of filing the petition was capable of relieving the beneficiary from having to allocate the majority of his time to the performance of non-qualifying tasks.

The AAO finds that the petitioner provided a deficient job description and failed to establish that its organization was adequately staffed at the time of filing the petition such that the beneficiary could focus his efforts primarily on the performance of tasks within a qualifying managerial or executive capacity. Although counsel asserts on appeal that the director overlooked or misinterpreted the petitioner’s prior submissions, he provides no clarification or explanation as to what led him to this conclusion. Dismissing relevant information (pertaining to the job duties of the beneficiary’s subordinates) as irrelevant is unpersuasive, particularly when the job duties of the subordinates would help explain how the beneficiary is relieved from having to perform daily operational tasks. While the AAO also acknowledges that no beneficiary is required to allocate 100% of his or her time to managerial- or executive-level tasks, the petitioner must establish that the non-qualifying tasks the beneficiary performed or would perform were/are only incidental to the position in question. An employee who “primarily” performs the tasks necessary to produce a product or to provide services is not considered to be “primarily” employed in a managerial or executive capacity. *See* sections 101(a)(44)(A) and (B) of the Act (requiring that one “primarily” perform the enumerated managerial or executive duties); *see also Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988).

In light of the deficiencies discussed above, the AAO finds that the petitioner failed to provide the necessary information to establish that the beneficiary’s proposed position with the U.S. entity would involve primarily qualifying managerial- or executive-level tasks. On the basis of this conclusion, the director’s decision denying the petition will be affirmed.

While not previously addressed in the director’s decision, the AAO’s review of the beneficiary’s Forms G-325 (which were submitted with the petitioner’s current and previously filed Forms I-140) cause the AAO to question whether the beneficiary was employed abroad for one year during the relevant three-year period. The regulation at 8 C.F.R. § 204.5(j)(3)(i) states, in part, the following:

- A) If the alien is outside the United States, in the three years preceding the filing of the petition the alien has been employed outside the United States for at least one year in

a managerial or executive capacity by a firm or corporation, or other legal entity, or by an affiliate or subsidiary of such a firm or corporation or other legal entity; or

- B) If the alien is already in the United States working for the same employer or a subsidiary or affiliate of the firm or corporation, or other legal entity by which the alien was employed overseas, in the three years preceding entry as a nonimmigrant, the alien was employed by the entity abroad for at least one year in a managerial or executive capacity[.]

The clear language of the statute indicates that the relevant three year period is that "preceding the time of the alien's application for classification and admission into the United States under this subparagraph." § 203(b)(1)(C) of the Act, 8 U.S.C. § 1153(b)(1)(C). The statute, however, is silent with regard to aliens who have already been admitted to the United States in a nonimmigrant classification. In promulgating the regulations on section 203(b)(1)(C) of the Act, the legacy Immigration and Naturalization Service (INS) concluded that it was not the intent of Congress to exclude L-1A multinational managers or executives who had already been transferred to the United States from this employment-based immigrant classification. Specifically, INS stated the following with regard to the interpretation of the Congressional intent behind the relevant statutory provisions:

The Service does not feel that Congress intended that nonimmigrant managers or executives who have already been transferred to the United States should be excluded from this classification. Therefore, the regulation provides that an alien who has been a manager or executive for one year overseas, during the three years preceding admission as a nonimmigrant manager or executive for a qualifying entity, would qualify.

56 Fed. Reg. 30703, 30705 (July 5, 1991).

In other words, for those aliens who are currently in the United States in L-1A status, the relevant time period mentioned in the statute should be the three-year period preceding the time of the alien's application and admission as (or change of status to) an L-1A multinational managerial or executive classification.

The Form G-325, which the beneficiary submitted at the time of filing the Form I-140 and which contains the beneficiary's employment history, indicates that the beneficiary was employed abroad by the petitioner's parent entity from August 2004 to May 2007 and that he subsequently commenced his employment with the petitioning entity in October 2009. Although the beneficiary's residence history, which is contained within the same document, shows that the beneficiary has resided in the United States since May 2007, immediately after his employment with the foreign entity was terminated, the beneficiary clearly did not enter the United States for the purpose of being employed by the petitioning entity, as demonstrated by the fact that the petitioner was not incorporated until February 5, 2009.

Accordingly, the beneficiary does not fit the criteria described in 8 C.F.R. § 204.5(j)(3)(i)(B) (which applies only to those beneficiaries who come to the United States to be employed by the same entity, or its subsidiary, or affiliate) and must have his period of employment abroad analyzed under the criterion described at 8 C.F.R. § 204.5(j)(3)(i)(A), which states that the relevant three-year time period is that which falls within the three years prior to the filing of the instant petition. As the instant petition was filed in 2010 and it is well established that the beneficiary was present in the United States between from May 2007 through November

2010 when the instant petition was filed, it cannot be concluded that the beneficiary was employed abroad during the relevant three-year time period, regardless of whether or not the petitioner is able to provide evidence showing that the employment abroad was in a managerial or executive capacity.

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004)(noting that the AAO reviews appeals on a *de novo* basis). Based on the additional ground of ineligibility discussed above, this petition cannot be approved.

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden.

ORDER: The appeal is dismissed.